

SUBSTANCE OF THE INTERVIEW

On March 25, 2010 the Applicant's attorney participated in a telephonic interview with the Examiner. The discussion was directed to amending the preamble of claim 1 to include the elements of a tub-like container having a floor and receiving aperture and further amending the body of the claim to include the elements of the cylindrical tube portion being configured to insert into the receiving aperture in the tub-like container such that the container floor adjacent to the receiving aperture is located between the top surface of the base and the adjustment member. The Examiner stated that a further search and/or consideration would be required to determine the patentability of the proposed claim amendments. Applicant thanks the Examiner for taking the time to participate in the interview.

REMARKS

The following issues are outstanding in the pending application:

- Claims 1-4 and 6-23 are rejected under 35 USC 112;
- Claims 1-4, 6-16 and 21-23 are rejected under 35 USC 103;
- Claims 17-19 are rejected under 35 USC 103; and
- Claim 20 is rejected under 35 USC 103.

Claim Amendments

Claims 1, 16, and 20 have been amended to more clearly define the subject invention. Amended claim 1 now recites an adjustable overflow for insertion into a tub-like container having a floor and a receiving aperture in which the adjustable overflow has a base with a discharge aperture, a cylindrical tube portion with an axial passageway which is attached to the base and communicates with the discharge aperture, and a tubular adjusting member, wherein the cylindrical tube portion is configured to insert into the receiving aperture in the tub-like container such that the container floor adjacent to the receiving aperture is located between the top surface of the base and the adjustment member. Amended independent

claims 16 and 20 include the same elements. Support for this amendment is found in Fig. 1 and paragraph [0063]. No new matter has been added.

35 USC 112

Claims 1-4 and 6-23 are rejected by the Examiner under 35 USC 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. The Examiner has stated that the term “wall” lacks antecedent basis and it is unclear as to which claimed component the wall is referring to or if the wall is a new claimed component. Applicants have amended claims 1, 16 and 20 to remove the term “wall” and have replaced it with the term “floor” in order to clarify that the receiving aperture is in the floor of the container. Therefore, Applicant respectfully requests withdrawal of the rejection.

35 USC 103

Claims 1-4, 6-16 and 21-23 are rejected by the Examiner under 35 USC 103(a) as being unpatentable over U.S. Pat. No. 2,266,043 to Hutchins in view of U.S. Pat. No. 2,398,921 to Cook. Applicant respectfully traverses.

Hutchins describes a portable device that is adapted to be positioned over the drain opening for controlling the flow of liquid into the drain. The device comprises a base portion 1, and a hollow column 2 which is frictionally attached to the base member in a fluid-tight relation. The base portion is constructed of soft rubber or similar elastic, yieldable material. The skirt portion 6 of the base is of an over-all diameter sufficient to cover the usual strainer plate 12 in the drain opening of a sink so that it can lie thereover and seal with the bottom of the sink surrounding the strainer plate 12. See Fig. 2. This skirt-portion 6 is preferably made very thin and flexible so that it readily conforms to the sink in response to slight pressure of water or other liquid retained in the sink. The device is positioned immediately over the strainer plate 12 and concentric relative thereto so that the flange or skirt 6 overlaps the strainer plate 12 on all sides and prevents leakage of water thereunder.

Cook describes an adjustable overflow for use in bathtubs to safely fill the level from three to five inches above what is normally permitted by the usual overflow outlets. The base portion 10 of the overflow is secured over the conventional overflow outlet 12 on the side of a bathtub 14. See Fig. 2. A watertight joint must be provided where the base 10 contacts the surface of the tub 14. The overflow has a rotatable outside portion with openings that can be moved into and out of register with an interior wall with openings. Further openings are additionally provided on the top of the adjustable overflow to define a max level of fluid.

Graham v. John Deere Co., 383 U.S. 1, 148 USPQ 459 (1966), controls the consideration and determination of obviousness under 35 U.S.C. 103(a); *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1734-35, 167 L. Ed. 2d 705, 715 (U.S. 2007). The four factual inquires enunciated therein for determining obviousness are: (1) determining the scope and contents of the prior art; (2) ascertaining the differences between the prior art and the claims in issue; (3) resolving the level of ordinary skill in the pertinent art; and (4) evaluating evidence of secondary considerations.

In this case, neither the level of ordinary skill in the art, nor secondary considerations are at issue. However, in order to assess the scope and content of the prior art properly, a thorough understanding of the invention must be acquired by studying Applicant's claims and the specification. M.P.E.P. § 2141. Thus, the inquiry begins with construction of Applicant's claims, explained below. Next, when ascertaining the differences between the prior art and the claims at issue, both the invention and the prior art references as a whole must be considered, and *all* claim limitations must be considered when determining patentability of Applicant's invention. M.P.E.P. §§ 2141; 2143. When this is properly done in this case, as shown below, it becomes clear that differences exist that preclude obviousness. And finally, the test for obviousness requires identification of a reasonable basis for combining the claimed elements in the claimed fashion. *KSR*, 127 S. Ct. at 1741; M.P.E.P. §2143. As shown below, this requirement is not met in this case, and no *prima facie* case for obviousness is made.

Applying the proper test to this case begins with amended independent claims 1 and 16 that require an adjustable overflow for insertion into a tub-like container having a floor and a receiving aperture in which the adjustable overflow has a base with a discharge

aperture, a cylindrical tube portion with an axial passageway which is attached to the base and communicates with the discharge aperture, and a tubular adjusting member, wherein the cylindrical tube portion is configured to insert into the receiving aperture in the tub-like container such that the container floor adjacent to the receiving aperture is located between the top surface of the base and the adjustment member. Neither Hutchins nor Cook disclose such a feature. Both devices described by the cited references are only located within the tub itself and in neither is the container floor adjacent to the receiving aperture located between the top surface of the base and the adjustment member. In Hutchins the skirt portion 6 of the base is of an over-all diameter sufficient to cover the usual strainer plate 12 in the drain opening of a sink so that it can lie thereover and seal with the bottom of the sink surrounding the strainer plate 12. In Cook on a side of a bathtub 14 and a watertight joint must be provided where the base 10 contacts the surface of the tub 14.

In order to make a proper *prima facie* case for obviousness, all claim limitations must be accounted for. M.P.E.P. § 2143.03. This rejection fails to consider all elements of the claims and their meaning as the cited references do not include all elements of independent claims 1 and 16. Even if the devise of Hutchins was modified by the addition of the at least two additional openings of Cook, as discussed above, this combination would not result in the adjustable overflow of claims 1 and 16. Thus, the claims are erroneously rejected over the cited references and Applicant respectfully requests the rejection be removed. Therefore, Applicant respectfully submits that amended independent claims 1 and 16 are not obvious. If an independent claim is non-obvious under 35 U.S.C. 103, than any claim depending therefrom is by definition non-obvious. Applicant respectfully submits that claims 2-4, 6-15, and 21-23 depend at least in part from amended independent claims 1 and 16 respectively. Accordingly, Applicant respectfully requests reconsideration and withdrawal of the outstanding rejection of claims 1-4, 6-16 and 21-23 under 35 U.S.C. 103(a) as having subject matter unpatentable over U.S. Pat. No. 2,266,043 to Hutchins in view of U.S. Pat. No. 2,398,921 to Cook.

Claims 17-19 are rejected under 35 USC 103(a) as being unpatentable over Hutchins in view of Cook, and further in view of DE Patent No. 20213719 (the “German Patent”). Applicant respectfully traverses.

Applicant respectfully submits that the previous discussion of the patentability of the current invention over the Hutchins and Cook references obviates this rejection. The German Patent reference adds no new teaching to the Hutchins and Cook references that would result in the inventive storage platform of amended claim 16. Claims 17-19 depend at least in part on amended independent claim 16. If an independent claim is non-obvious under 35 U.S.C. 103, than any claim depending therefrom is by definition nonobvious. *In re Fine*, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988). Applicant respectfully asserts that because of their dependency from 16, claims 7-19 are nonobvious over these references. Accordingly, Applicant respectfully requests reconsideration and withdrawal of the outstanding rejection of claims 17-19 under 35 U.S.C. 103(a) as being unpatentable over Hutchins in view of Cook, in further view of the German Patent.

Claim 20 is rejected under 35 USC 103(a) as being unpatentable over Hutchins in view of Cook, and further in view of the German Patent. Applicant respectfully traverses.

The German Patent illustrates a rectangular storage platform that has two mounting members in each case on two parallel narrow sides for hanging them in rack struts. Each mounting member has an engagement end portion ending freely.

Amended independent claim 20 requires a watering device for storing, watering and transporting plants that requires at least two storage platforms arranged one on top of the other, the platforms having a tub-like design and having at least one overflow having a base with a discharge aperture. A cylindrical tube portion with an axial passageway is attached to the base and communicates with the discharge aperture and a tubular adjusting member. The cylindrical tube portion is configured to insert into a receiving aperture in the tub-like container having a floor, such that the floor adjacent to the receiving aperture is located between the top surface of the base and the adjustment member. As discussed above, neither Hutchins nor Cook disclose such a feature. Both devices described by the cited references are only located within the tub itself and in neither is the container floor adjacent to the receiving aperture located between the top surface of the base and the adjustment member. In Hutchins the skirt portion 6 of the base is of an over-all diameter sufficient to cover the usual strainer plate 12 in the drain opening-of a sink so that it can lie thereover and seal with the bottom of the sink surrounding the strainer plate 12. In Cook the base portion 10 of the

overflow is secured over the conventional overflow outlet 12 on a side of a bathtub 14 and a watertight joint must be provided where the base 10 contacts the surface of the tub 14. The German Patent only teaches a rectangular storage platform that provides for a flow of liquid between the storage platforms.

In order to make a proper *prima facie* case for obviousness, all claim limitations must be accounted for. M.P.E.P. § 2143.03. This rejection fails to consider all elements of amended independent claim 20 and their meaning as the cited references do not include all elements of independent claim 20. If the devise of Hutchins was modified by adding the multiple storage platforms and liquid flowing between the storage platforms of the German Patent and further modified by the addition of the at least two additional openings of Cook, this combination, as discussed above, would not result in the storage platform of amended claim 20. Thus, the claim is erroneously rejected over the cited references and Applicant respectfully requests the rejection be removed. Therefore, Applicant respectfully submits that amended independent claim 20 is not obvious. Accordingly, Applicant respectfully requests reconsideration and withdrawal of the outstanding rejection of claim 20 under 35 U.S.C. 103(a) as having subject matter unpatentable over U.S. Pat. No. 2,266,043 to Hutchins in view of U.S. Pat. No. 2,398,921 to Cook and further in view of the German Patent.

CONCLUSION

The fee for an RCE is being submitted with this amendment. If additional fees are due, please charge our Deposit Account No. 06-2375, under Order No. HO-P03260US0 from which the undersigned is authorized to draw.

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Respectfully submitted,

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